

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Stephen Morgan,	:	
	:	
Complainant,	:	
	:	
v.	:	No. C-2020-3021730
	:	
Columbia Gas of Pennsylvania, Inc.	:	
	:	
Respondent.	:	

RESPONSE IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Complainants, Stephen Morgan and Brian Dolfi (“**Complainants**”), by and through their undersigned counsel, Christopher A. Cafardi, Dennis R. Very and Cafardi Ferguson Wyrick Weis + Gabriel llc, file the within Response in Opposition to Motion for Judgment on the Pleadings and in support thereof, state as follows:

1. Admitted in part and denied in part. Complainants admit that this action was initiated by the filing of a Formal Complaint with the Pennsylvania Public Utility Commission (the “**Commission**”). The remaining allegations of this paragraph refer to a document, which speaks for itself. Complainants deny Respondent’s allegations insofar as they are inconsistent with the contents of the written document or otherwise attempt to paraphrase the document.

2. Admitted.

3. Admitted in part and denied in part. Complainants admit that on or about October 26, 2020, Judge DeVoe issued an Interim Order. The remaining allegations of this paragraph refer to a document, which speaks for itself. Complainants deny Respondent’s allegations insofar as they are inconsistent with the contents of the written document or otherwise attempt to paraphrase the document.

4. The allegations of this paragraph refer to a document, which speaks for itself.

Complainants deny Respondent's allegations insofar as they are inconsistent with the contents of the written document or otherwise attempt to paraphrase the document.

5. Admitted.

6. Admitted.

7. Complainants admit that on or about December 18, 2020, Respondent filed its Answer to the Amended Formal Complaint. The remaining allegations in this paragraph contain legal conclusions to which no response is required.

8. The allegations of this paragraph refer to a document, which speaks for itself. Complainants deny Respondent's allegations insofar as they are inconsistent with the contents of the written document or otherwise attempt to paraphrase the document. By way of further response, Paragraphs 8, 9, and 35 of the Amended Formal Complaint state the following:

8. Upon information and belief, sometime prior to September 2018, Columbia Gas installed a gas line (the "**Gas Line**") in the vicinity of Scenery Drive along and/or within the property line of the Subject Properties (the "**Gas Line Installation**").

9. In or about September 2018, a landslide occurred near and/or along the entire length where the Morgan Properties border Scenery Drive and near and/or along a portion of where the Dolfi Property borders Scenery Drive (the "**2018 Landslide**").

35. As previously provided above, Columbia Gas breached its duties to Morgan and Dolfi and violated 66 Pa. C.S.A. § 1501 by failing to maintain adequate, efficient, safe, and reasonable facilities and by failing to make all proper repairs, changes, alterations, substitutions, extensions, and/or improvements regarding the Gas Line Installation and the 2018 Installation and by failing to restore the Subject Properties to their previous condition by properly repairing the damage done to the Subject Properties caused by Columbia Gas.

Amended Formal Complaint at ¶¶ 8, 9, 35.

9. The allegations of this paragraph refer to a document, which speaks for itself.

Complainants deny Respondent's allegations insofar as they are inconsistent with the contents of

the written document or otherwise attempt to paraphrase the document. By way of further response, Paragraphs 9, 10, and 11 of the Amended Formal Complaint state the following

9. In or about September 2018, a landslide occurred near and/or along the entire length where the Morgan Properties border Scenery Drive and near and/or along a portion of where the Dolfi Property borders Scenery Drive (the “**2018 Landslide**”).

10. Upon information and belief, the 2018 Landslide was caused by Columbia Gas’s improper Gas Line Installation including, but not limited to the failure to use proper materials and to compact appropriately, as well as Columbia Gas’s failure to properly repair the trench after settlement occurred.

11. The Landslide damaged the Subject Properties as evidenced by slope failure of the soils and sliding of the entire length of the hillside near and bordering Scenery Drive.

Amended Formal Complaint at ¶¶ 9, 10, 11.

10. The allegations of this paragraph refer to written documents, which speak for themselves. Complainants deny Respondent’s allegations insofar as they are inconsistent with the contents of the written documents or otherwise attempt to paraphrase the documents. Furthermore, the allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is deemed required, Complainants deny those allegations. By way of further response, according to 66 Pa. C.S.A §3314(a) of the Public Utility Code:

(a) General rule. No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained *unless brought within three years from the date at which the liability therefor arose*, except as otherwise provided in this part.

66 Pa. C.S.A §3314(a) (emphasis added). Generally, the statute of limitations begins to run as soon as the plaintiff could have first maintained an action. *Marcum v. Columbia Gas Transmission, LLC*, 423 F. Supp. 3d 115, 126 (E.D. Pa. 2019) (citing *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 857 (2005)). However, in certain circumstances, the limitations period can be tolled. “One such circumstance, entitled the ‘discovery rule,’ is when ‘the injury or its cause was neither known

nor reasonably knowable' to a plaintiff who exercised 'reasonable diligence' to learn about the issue." *Id.* (quoting *Fine*, 870 A.2d at 858). In such circumstances, "the clock only begins to run once the plaintiff discovers or reasonably should have discovered she was injured by another party's conduct." *Id.* (citing *Fine*, 870 A.2d at 859). "The discovery rule tolls the limitations period when 'the injury or its cause' were not reasonably knowable." *Id.* at 126-127 (quoting *Fine*, 870 A.2d at 858) emphasis added); see also *Kelly v. Carman Corp.*, 229 A.3d 634, 648 (Pa. Super. 2020) ("In Pennsylvania, the occurrence rule is used to determine when the statute of limitations begins to run ... An exception to this rule is the equitable discovery rule which will be applied when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause"). "[T]he statute of limitation in subsurface injury runs from the time of discovery of the cause of the harm or when the cause should have reasonably been discovered. *Welsh v. City of Philadelphia, et al.*, 1987 WL 582723, 16 Phila.Co.Rptr.130, *139 (Pa. Com. Pl. May 13, 1987) (citing *Smith v. Bell Telephone*, 153 A.2d 477, 481 (Pa. 1959).

11. The allegations of this paragraph refer to a written document, which speaks for itself. Complainants deny Respondent's allegations insofar as they are inconsistent with the contents of the written document or otherwise attempt to paraphrase the document. Furthermore, the remaining allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is deemed required, Complainants deny those allegations. By way of further response, here, liability regarding the alleged improper installation and repair of the gas line along Scenery Drive did not arise until, at the earliest, September 2018, when the landslide occurred. It was not until the landslide occurred that Complainants had the ability to discover the injury or its cause, namely the alleged improper installation of the gas line by Respondents. Thus, the statute of limitations began to run, at the earliest, upon discovery of the cause of the harm or

when the cause should have reasonably been discovered after the September 2018 landslide, meaning that the statute of limitations would expire, at the earliest, after September 2021. Here, this action was initiated with the Commission on or about August 6, 2020. *See* MJP at ¶ 1. Thus, this action was initiated well before the statute of limitations expires. Additionally, Respondent failed to cite any authority—caselaw or otherwise—to support the assertion that the statute of limitations began to run at the time of installation of the gas line rather than at the time the injury and its cause were reasonably discovered and known by Complainants. Therefore, Respondent’s statute of limitations argument is without merit.

Moreover, Respondent failed to raise statute of limitations as a defense in its responsive pleadings to the Formal Complaint or the Amended Formal Complaint and, as such, it is waived. “The defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030.” *See* Official Note to 231 Pa. Code §1028.

Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, *statute of limitations*, truth and waiver *shall be pleaded in a responsive pleading under the heading “New Matter.*

231 Pa. Code §1030(a) (emphasis added). “A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b).” 231 Pa. Code §1032(a); *see also Tanner v. Allstate Ins. Co.*, 467 A.2d 1164, 1168 (Pa. Super. 1983) (“The statute of limitations is an affirmative defense which must be specifically pleaded or the defense is waived”). Respondent waived the defense of statute of limitations by failing to assert it as an affirmative defense in its responsive pleadings, therefore Respondent’s Motion for Judgment on the Pleadings should be denied.

12. The allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is deemed required, Complainants deny those allegations. By way of further response, “The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services.” *Elkin v. Bell Tel. Co. of Pennsylvania*, 420 A.2d 371, 374 (Pa. 1980); *see also Behrend v. Bell of Pennsylvania*, 243 A.2d 346, 347 (Pa. 1968); *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252, 257 (Pa. 1972); *Borough of Lansdale v. Philadelphia Electric Co.*, 170 A.2d 565, 566-67 (Pa. 1961). The Pennsylvania Supreme Court has stated:

Although we still possess the right of judicial scrutiny over the acts of the PUC, no principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC not in the courts. It has been so held involving rates, service, rules of service, extension and expansion, *hazard to public safety due to use of utility facilities, installation of utility facilities, location of utility facilities, obtaining, alerting, dissolving, abandoning, selling or transferring any right, power, privilege, service, franchise or property and right to serve particular territory.*

Borough of Lansdale, 170 A.2d at 567 (footnotes omitted). “[W]here the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent.” *Elkin*, 420 A.2d at 377.

13. The allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is deemed required, Complainants deny those allegations. By way of further response, here, the dispute at issue concerns the reasonableness, adequacy and sufficiency of Respondent’s installation and repair of the Gas Line—subject matter which has long

been considered within the jurisdiction of the PUC. Complainants Formal Amended Complaint alleges that the damage to Complainants' properties was caused by Respondent's improper gas line installation, including a failure to use appropriate materials, properly compact those materials, and properly repair the trench after settlement occurred. *See* Amended Formal Complaint at ¶¶ 9-11. This dispute is subject to the jurisdiction of the PUC in that this dispute involves, among other things, Columbia Gas facilities as well as its violation of 66 Pa. C.S.A. § 1501. *See id.* at ¶ 27. 66 Pa. C.S.A. § 501 provides that the Commission has a duty to enforce, execute and carry out, by its regulations, orders and otherwise all the provisions of the Code. *See id.* at ¶ 28. 66 Pa. C.S.A. § 2205(b)(3) provides that disputes concerning facilities shall be subject to the jurisdiction of the Commission and may be initiated by the filing of a complaint under section 701 by the Commission or any interested party. *See id.* at ¶ 29. 66 Pa. C.S.A. § 701 provides that any person having an interest in the subject matter may file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or any regulation or order of the commission. *See id.* at ¶ 30. 66 Pa. C.S.A. § 1501 provides that Respondent has duties to furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See id.* at ¶ 34.

Complainants have an interest in the damage done to the Subject Properties by Respondent's failure to furnish and maintain an adequate, efficient, safe, and reasonable Gas Line, and/or Respondent's failure to make all such repairs, changes, alterations, substitutions, extensions, and/or improvements in or to the Gas Line as shall be necessary and or proper for the

accommodation, convenience, and safety of Complainants. *See id.* at ¶ 31. Further, Complainants have an interest in the damage done to the Subject Properties by Respondent's failure to return the Subject Properties to their original condition prior to the Gas Line Installation, failure to properly repair the damage done to the Subject Properties by the 2018 Landslide, and failure to properly perform the Gas Line Installation. *See id.* at ¶ 32. Restoring the Subject Properties to their previous condition and removing any old lines on the Subject Properties is necessary and proper for the accommodation, convenience, and safety of the Complainants, Morgan and Dolfi. *See id.* at ¶ 36. Thus, the subject matter of the Amended Formal Complaint is well within the PUC's jurisdiction and involves a matter requiring the special competence of the PUC, specifically the reasonableness, adequacy, and sufficiency of Respondent's installation and repair of the Gas Line, and, as such, the PUC is the appropriate forum to adjudicate this dispute. Therefore, Respondent's Motion for Judgment on the Pleadings should be denied.

WHEREFORE, for the reasons set forth above and in Complainant's Brief in Opposition to Motion for Judgment on the Pleadings, Respondent Columbia Gas of Pennsylvania, Inc.'s Motion for Judgment on the Pleadings should be denied in its entirety.¹

¹ In the unlikely event that the Commission is inclined to grant Respondent's Motion for Judgment on the Pleadings, Complainants request that the Commission transfer this matter to the proper Pennsylvania Court of Common Pleas pursuant to law, including but not limited to 42 Pa. C.S.A. § 5103, instead of dismissing this action outright.

Respectfully Submitted,

Cafardi Ferguson Wyrick Weis + Gabriel llc

By: /s/ Dennis r. Very_____

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Date: January 11, 2021

*Counsel for Complainants, Stephen Morgan and
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the following document by electronic service pursuant to Emergency Order at Docket No. M-2020-3019262, upon the participants listed below, in accordance with the requirements of Section 1.54 (relating to service by a participant).

Larry R. Crayne, Esquire
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Emily I. DeVoe, Administrative Law Judge
edevoe@pa.gov

January 11, 2021

/s/ Dennis R. Very
Dennis R. Very